No. 90 634

IN THE

Supreme Court of the United States

October Term, 1990

DAN COHEN,

Petitioner,

vs.

COWLES MEDIA COMPANY, d/b/a Minneapolis Star and Tribune Company, and NORTHWEST PUBLICATIONS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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1990 — Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411 — 588-7506

QUESTIONS PRESENTED FOR REVIEW

Does the First Amendment of the U.S. Constitution grant newspapers immunity from liability for damages caused by dishonoring promises of confidentiality given in exchange for information on a political candidate?

Does the Contract Clause of the U.S. Constitution permit state courts to declare unenforceable agreements of confidentiality between newspapers and sources of information?

TABLE OF CONTENTS

	Page
Questions presented for review	i
Reports of opinions in this case delivered by courts below	1
Grounds on which jurisdiction of this Court is invoked	2
Constitutional provisions involved	2
Statement of the case	2
Reasons for granting the writ:	
I. This case presents an important issue not previously the subject of a Supreme Court decision	6
II. The opinion below conflicts in principle with decisions of the United States Supreme Court	11
A. The First Amendment	12
B. The Contract Clause	16
III. The opinion below conflicts with decisions of other jurisdictions	18
Conclusion	20
Appendix (Opinions below)	Under Separate Cover

TABLE OF AUTHORITIES

Cases:

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978)	17, 18
Board of Education of Westside Community Schools v. Mergens, 110 S.Ct. 2356 (1990)	12
Branzburg v. Hayes, 408 U.S. 665 (1972)	13
Christensen v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740 (Minn. 1983)	17

City of Oak Creek v. King, 436 N.W.2d 285 (Wis. 1989) 20
D. H. Overmyer Co., Inc. v. Frick Co., 405 U.S. 174 (1972) 15
Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) 20
Doe v. American Broadcasting Cos., 152 A.D.2d 482, 543 N.Y.S.2d 278 (1989), appeal dismissed, 74 N.Y.2d 945, 549 N.E.2d 480, 550 N.Y.S.2d 278 (1989) 18
Employment Div., Dept. of Human Resources v. Smith, 110 S.Ct. 1595 (1990) 14
Erie Telecommunications, Inc. v. City of Erie, Pennsylvania, 853 F.2d 1084 (3d Cir. 1988) 19
Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) 20
Harte-Hanks Communications, Inc. v. Connaughton, 109 S.Ct. 2678 (1989) 14, 15
Herbert v. Lando, 441 U.S. 153 (1979) 13
Huskey v. National Broadcasting Co., Inc., 632 F. Supp. 1282 (N.D. Ill. 1986) 19
James v. Illinois, 110 S.Ct. 648 (1990) 16
Mayer v. State, 523 So.2d 1171 (Fla. App. 2 Dist. 1988), rev. den., 529 So.2d 694 (Fla. 1988) 19
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 13
Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 14
Minnesota v. Hershberger, 110 S.Ct. 1918 (1990) ... 14
New York Times v. Sullivan, 376 U.S. 254 (1964) 11, 14, 20
Ruzicka v. Conde Nast Publications, Inc., 733 F. Supp. 1289 (D. Minn. 1990) 7, 9, 11, 19
Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) .. 12
Snepp v. United States, 444 U.S. 507 (1980) 12
States v. Heltzel, 552 N.E.2d 31 (Ind. 1990) 20
The Florida Star v. B.J.F., 109 S.Ct. 2603 (1989) ... 16
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) 17

Other Authorities:

E. Abel, Leaking: Who Does It? Who Benefits? At What Cost? (1987) 8, 18
Borger, Publication Torts as Contracts and Misrepresentations: Redirecting Judicial Focus, Libel Litigation 1990, 35 (PLI 1990) 10
R. Clurman, Beyond Malice: The Media's Years of Reckoning (1988) 8, 9
D. Gillmor and J. Barron, Mass Communication Law: Cases and Comment (5th ed. 1990) 7
Langley & Levine, Branzburg Revisited: Confidential Sources and First Amendment Values, 57 Geo. Wash. L. Rev. 13 (1988) 18
Langley & Levine, Broken Promises, Columbia Journalism Review (July/August 1988) 21 10
Note, Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement, 73 Minn. L. Rev. 1553 (1989) 8, 10, 17
Osborn, The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas, 17 Colum. Hum. Rts. L. Rev. 57 (1985) 8
R. Smolla, Law of Defamation (1990) 7

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner, Dan Cohen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota entered in this proceeding on July 20, 1990.

REPORTS OF OPINIONS IN THIS CASE DELIVERED BY COURTS BELOW

1. 14 Med. L. Rptr. 1460 (Minn. Dist. Ct. 1987).
2. 15 Med. L. Rptr. 2288 (Minn. Dist. Ct. 1988).
3. 445 N.W.2d 248 (Minn. App. 1989).
4. 457 N.W.2d 199 (Minn. 1990).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Judgment of the Supreme Court of Minnesota was dated July 20, 1990. Jurisdiction of this Court is conferred by 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 10, cl. 1. No state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . .

Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

Amendment XIV, § 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On October 27, 1982, Dan Cohen, then working for Minnesota Republican gubernatorial nominee Wheelock Whitney in his position as public relations director of a Minneapolis advertising agency, contacted reporters from Minnesota's two largest newspapers—the Star Tribune of Minneapolis and the St. Paul Pioneer Press Dispatch. In separate meetings with each reporter, Mr. Cohen stated:

> I have some documents which may or may not relate to a candidate in the upcoming election, and if you will give me a promise of confidentiality, that is that I will be treated as an anonymous source, that my name will not appear in any material in connection with this,

> and you will also agree that you're not going to pursue with me a question of who my source is, then I'll furnish you with the documents.

Mr. Cohen demanded commitments of anonymity because he feared retaliation.

The reporters were experienced journalists covering the gubernatorial election who knew that he was an active Republican associated with the Whitney campaign. They agreed to his conditions and promised him confidentiality.

Mr. Cohen then gave each authentic copies of public court records documenting Democratic lieutenant governor candidate Marlene Johnson's arrest for unlawful assembly in 1969, her conviction of petit theft in 1970 and the 1971 vacating of it.

Star Tribune reporter Lori Sturdevant told Mr. Cohen, "This is the sort of thing that I'd like to have you bring by again if you ever have anything like it." Pioneer Press reporter Bill Salisbury told him the documents were "political dynamite." A-23.

Mr. Cohen also contacted reporters from the Associated Press and WCCO-TV (the Minneapolis CBS affiliate) and gave them the same documents after each promised him confidentiality.

The Associated Press and WCCO-TV honored their promises. The former published a story without identifying Mr. Cohen; the latter did not broadcast the story.

In contrast, after being informed of the promises to Mr. Cohen, editors of the two newspapers decided to use the documents supplied by him but to renege on these promises. Both reporters objected strongly, and Ms. Sturdevant demanded that her name not appear on the published story.

Star Tribune editors instructed Ms. Sturdevant to ask Mr. Cohen to release the Star Tribune from what editor Frank Wright called "this agreement." Tr. at 1490. She telephoned Mr. Cohen two or three times, but each time Mr. Cohen refused to allow his name to be published. The editors did so anyway. A-24.

The next day, October 28, both newspapers published articles about Ms. Johnson's arrests and conviction which identified Mr. Cohen as the source of the information. The Star Tribune's front page article also named Mr. Cohen's employer.

Mr. Cohen was fired the day the articles were published.

The following day, a Star Tribune columnist attacked Mr. Cohen for supplying the documents to the newspaper. The day after that, the Star Tribune published an editorial cartoon depicting Mr. Cohen as a garbage can labeled "last minute campaign smears."

None of the aforementioned articles disclosed that the newspapers made and broke promises to Mr. Cohen.

Mr. Cohen sued the newspapers for breach of contract and misrepresentation. The trial court, in its opinions denying motions for summary judgment and judgment notwithstanding the verdict, ruled that the First Amendment did not bar this action. Finding liability on both claims, the jury awarded Mr. Cohen $200,000 in compensatory and $500,000 in punitive damages. The Minnesota Court of Appeals reversed the finding of misrepresentation, and therefore the award for punitive damages, but affirmed the verdict of compensatory damages for breach of contract over defendants' First Amendment arguments.

The Minnesota Supreme Court, by a vote of four to two, reversed the compensatory damages award. It first held that

a contract cause of action was inappropriate for promises of news source confidentiality even with the existence of an offer, an acceptance, consideration, and a breach and the intention of the promisors to keep their promises. It then held that, despite Mr. Cohen's injuries from reliance upon the newspapers' promises, enforcement of these promises under a contract implied by a promissory estoppel theory would violate the newspapers' First Amendment rights. A-13-14. "Of critical significance in this case, we think, is the fact that the promise of anonymity arises in the classic First Amendment context of the quintessential public debate in our democratic society, namely, a political source involved in a political campaign." A-13.

Defendants raised First Amendment issues in their answers, their motions for summary judgment and judgment notwithstanding the verdict, and their appeals to the Minnesota Court of Appeals and the Minnesota Supreme Court. Respondent Northwest Publications told the Minnesota Supreme Court (reply brief at 11), "The precise question before this Court is whether an accommodation of First Amendment interests must be made here . . ." In a statement issued after the decision below, Star Tribune executive editor Joel R. Kramer said, "We are especially pleased that the court has ruled that the decision to publish true facts relating to the activities of a 'political source in a political campaign' is one that is protected by the First Amendment." New York Times, July 21, 1990, at 6, col. 4.

Petitioner raised the issue of the Constitution's prohibition against any state law impairing the obligation of contracts in his brief to the Minnesota Supreme Court (at 48) in response to the dissenting opinion of Judge Gary Crippen of the Minnesota Court of Appeals. A-48-50. The opinion below did not specifically pass upon this issue.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT ISSUE NOT PREVIOUSLY THE SUBJECT OF A SUPREME COURT DECISION.

This case raises the question of whether the First Amendment empowers newspapers to inflict injuries with impunity by deliberately breaking promises of confidentiality given for the purpose of obtaining desired information. No previous decision of this Court has specifically addressed this issue. Minnesota Supreme Court Justice Lawrence Yetka in his dissent said that the First Amendment "is being misused" to enable the press to avoid liability for the consequences of broken promises. A-14. Should the press be allowed to employ the Constitution to thwart a remedy for acts, assailed as unethical even by media supporters, which would be unlawful when committed by others?

First Amendment attorney Floyd Abrams called the newspapers' behavior "reprehensible and damaging to all journalists." New York Times, July 21, 1990, at 6, col. 4. Legal affairs columnist Lyle Denniston said that the breaking of promises of confidentiality "is a straightforward, baldfaced ethical violation." Star Tribune, July 23, 1988, at 1A, col. 5. Minnesota Supreme Court dissenting Justice Glenn Kelley reproached "the perfidy of these defendants, the liability for which they now seek to escape by trying to crawl under the aegis of the First Amendment, which, in my opinion, has nothing to do with the case." A-18. The Minnesota Court of Appeals held that certain evidence was admissible "to show that the Tribune was acting with willful indifference to his rights, and was continuing to disparage him while failing to disclose its own breach of promise." A-44.

Trial Judge Franklin Knoll termed defendants' "knowing and willful breach of a legally sufficient contract . . . a calculated misdeed." A-69. Even the Minnesota Supreme Court majority called dishonorable and contrary to a moral obligation the breaking of promises made to induce a source to give information. A-8.

This case has attracted national attention from the news media and scholars.[1] Even the respondents have acknowledged that this is a case of national importance. In its petition for review to the Minnesota Supreme Court (at 2), Cowles Media Co. told that court that its decision "will help to develop and clarify the law and likely will have nationwide as well as statewide impact." Louise Sommers, an attorney for the Associated Press which filed an amicus brief below, called the Minnesota Supreme Court decision a major victory for the news media. Washington Post, July 21, 1990, at A3, col. 1.

Confidential sources are a regular, indeed an essential, component of news gathering. They are used in reporting on almost all news areas, but are relied upon most heavily in reporting about the subject of government. A-8; Wall Street Journal, July 23, 1990, at B2, col. 3; *Ruzicka v. Conde Nast Publications, Inc.*, 733 F. Supp. 1289, 1299 (D. Minn. 1990).

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[1]This case has been the subject of articles in Time magazine (August 1, 1988, at 61), the New York Times (July 23, 1988, at 6, col. 5; July 24, 1988, § 1, at 10, col. 4; July 31, 1988, § 4, at 7, col. 1; Aug. 9, 1988, at 40, col. 2; Sept. 6, 1989, at 15, col. 5; July 21, 1990, at 6, col. 4), the Wall Street Journal (August 11, 1988, at 23, col. 3; July 23, 1990, at A1, col. 3, and B2, col. 3), the Washington Post, June 13, 1988, at A4, col. 2; July 21, 1990, at A3, col. 1), and others. It was featured on the MacNeil/Lehrer Newshour (July 26, 1988). In addition to the 1988 and 1989 law and journalism review articles cited in the petition, this case is discussed in R. SMOLLA, LAW OF DEFAMATION, § 12.06[3] (1990); and D. GILLMOR & J. BARRON, MASS COMMUNICATION LAW: CASES AND COMMENT 362, 394 (5th ed. 1990).

Dependence upon confidential sources has increased over the past twenty years; today, eighty percent of national news magazine articles and fifty percent of national wire service stories, for example, rely on confidential sources. Note, *Promises and the Press: First Amendment Limitations on News Source Recovery for Breach of a Confidentiality Agreement,* 73 Minn. L. Rev. 1553, 1563 (1989). Fully 42% of former federal officials in policy making positions questioned in a recent survey admitted having given the press information on condition of anonymity while in office. E. ABEL, LEAKING: WHO DOES IT? WHO BENEFITS? AT WHAT COST? 62 (1987).

Another survey showed that Pulitzer Prize nominees have used confidential sources in more than 30% of their stories. Two-thirds of the nominees said that information from confidential sources played a significant role in the development of stories nominated for the prize. Several agreed that the more important the story, the more likely the need for confidentiality. "When it comes to stories that count, i.e., those that are embarrassing to government officials and politicians, the use of confidential sources is often a necessity." Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas,* 17 Colum. Hum. Rts. L. Rev. 57, 73-4 (1985).

Information on political candidates often comes from confidential sources supporting opponents. R. CLURMAN, BEYOND MALICE: THE MEDIA'S YEARS OF RECKONING 158 (1988).

Journalism executive and educator Richard M. Clurman says that eliminating the use of confidential sources would carry a price "so high as to be unacceptable, not only to the press but to the public. Full disclosure would eliminate

much of the most valuable information and insights that regularly appear in news stories." Abandoning the use of confidential sources would deprive the public of "a large percentage of the valuable, accurate and important stories that appear in print and on the air." On one typical day, the Washington Post attributed information to unidentified sources 106 times, the New York Times about as many, and the Wall Street Journal 42 in one story alone. *Id.*

Breaches of these promises may cause serious injury to the sources. "Their status in the community, their careers, perhaps even their lives may be at risk." *Ruzicka,* 733 F. Supp. at 1299.

Legalizing the violation of these promises would deter other potential sources resulting in the denial of important information to the public. *Id.*, A-8, A-15, A-18, A-35.

Recognizing the importance of confidential sources, 26 states have adopted shield laws. The Minnesota free flow of information act (whose adoption was lobbied for by respondents) and other such laws protect the news media from compelled disclosure of sources in courts and other proceedings. Minnesota Supreme Court brief of Northwest Publications at 24; A-18 n. 1. Minn. Stat. § 595.022 entitled "public policy" states that the public interest and free flow of information require protection of the confidential relationship between reporter and source.[2]

Nevertheless, media exposure of confidential sources is becoming more common. *Ruzicka,* 733 F. Supp. at 1299;

[2]Justice Yetka called it "unconscionable to allow the press on the one hand to hide behind the shield of confidentiality when it does not want to reveal the source of its information; yet, on the other hand, to violate confidentiality agreements with impunity when it decides that disclosing the source will help make its story more sensational and profitable." A-15.

Langley & Levine, *Broken Promises,* Colum. Journalism Rev. (July/Aug. 1988) 21, 21-2; Note, *Promises and the Press, supra* at 1566.

Many reporters now are naming confidential sources. Langley & Levine, *supra* at 21. According to Floyd Abrams, this trend may not have been widely recognized because news organizations are reluctant to let the journalistic community know that they are breaking their promises. "There's a lot of fibbing on this," he said. *Id.*

Cowles Media's reply brief (at 13) to the Minnesota Supreme Court pointed out that the Cohen case is not unique and that other journalists "have been willing to bend or break agreements with their sources." It referred to the "several such instances" cited in its two briefs to that court. A recent article by the Cowles Media counsel listed thirty cases around the country raising issues of violations of contracts or promises by media organizations. Borger, *Publication Torts as Contracts and Misrepresentations: Redirecting Judicial Focus,* LIBEL LITIGATION 1990, 35, 69-102 (PLI 1990).

Cases raising issues of broken promises to confidential sources remain pending around the country. New York Times, July 21, 1990, at 6, col. 4; Wall Street Journal, July 23, 1990, at B2, col. 3. In other instances, according to Los Angeles Times attorney Rex Heinke, the revelation of sources "isn't reported in decisions. It just happens." Langley & Levine, *supra* at 21.

The Minnesota Supreme Court's opinion will likely have an immediate nationwide impact. One media law expert said that, even though several similar suits have been filed, "I would be surprised if this [the decision below] does not pretty much shut off the litigation in this area." Jane

Kirtley, executive director of the Reporters Committee for Freedom of the Press, quoted in Star Tribune, July 21, 1990, at 1B, col. 1.

This case presents explicitly the question of whether the First Amendment permits a media organization to deliberately violate an undisputed and unambiguous promise of confidentiality. A-9, A-11; *Ruzicka,* 733 F. Supp. at 1294.

It also has implications beyond the violation of promises. The Minnesota Supreme Court interpreted *New York Times v. Sullivan,* 376 U.S. 254 (1964), as holding that a state rule of law may not be applied "to impose impermissible restrictions" on freedom of the press. A-12 n.6. If it is impermissible to hold the press liable for dishonoring voluntary promises to obtain information, is it also to be granted a right to commit torts or crimes in gathering news?

II.

THE OPINION BELOW CONFLICTS IN PRINCIPLE WITH DECISIONS OF THE UNITED STATES SUPREME COURT.

The Minnesota Court of Appeals held that it was not "an undue burden to require the press to keep its promises." A-35. The opinion below, in contrast, would improperly aggrandize the powers of the press by sanctioning a wrongful means of gathering news. The public's interest in being informed would be disserved as well. As Justice Kelley said, the majority opinion "serves to inhibit rather than to promote the objectives of the First Amendment by 'drying up' potential sources of information on public matters." A-18.

This Court has not before accorded media organizations a constitutional privilege to break promises or contracts with others or to be immune from generally applicable laws.

A. The First Amendment.

The First Amendment does not allow the media to escape the consequences of violating promises made voluntarily with no governmental compulsion whatsoever. Unlike that of the Minnesota Court of Appeals (A28-31), the opinion below disregarded the difference between governmental coercion and private voluntary conduct. *See Board of Education of Westside Community Schools v. Mergens,* 110 S. Ct. 2356, 2372 (1990).

As the Minnesota Court of Appeals observed (A-33), this Court has held that a voluntary agreement not to publish is enforceable over claims of First Amendment rights. *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980), emphasized, "When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress."

This Court also has rejected claims of a First Amendment right to publish information received on condition of confidentiality. *Seattle Times v. Rhinehart,* 467 U.S. 20 (1984), upheld an order barring the publication of confidential information obtained through discovery. The Court held that, although there may be a public interest in knowing certain information, a newspaper does not necessarily have the right to publish it. It stressed that the newspaper gained access to the information only through a process which also placed restraints on how it could be used. "The right to speak and publish does not carry with it the unrestrained right to gather information." 467 U.S. at 32.

In holding that the First Amendment barred enforcement

of respondents' promises, the Minnesota Supreme Court relied upon *Miami Herald Pub. Co. v. Tornillo,* 418 U.S. 241 (1974), which struck down a requirement that newspapers publish replies to charges against candidates. A-13. However, the present case involves no governmental compulsion over editorial judgment but, rather, the exercise of that judgment through a voluntary promise of confidentiality in return for desired information. Indeed, *Miami Herald* distinguished between consensual conduct and governmental coercion and stressed that it is the latter which implicates the First Amendment. 418 U.S. at 254.

The Minnesota Supreme Court viewed *Miami Herald* as prohibiting "second-guessing" of editors. A-13. *Herbert v. Lando,* 441 U.S. 153, 167 (1979), however, held that *Miami Herald* "neither expressly or impliedly suggest[s] that the editorial process is immune from any inquiry whatsoever."

The opinion below poses the issue of the media's obligation to obey laws which bind all others. Justice Yetka said that it "offends the fundamental principle of equality under the law" by exempting newspapers from rules by which ordinary people are bound. A-15. Decisions of this Court support him.

Branzburg v. Hayes, 408 U.S. 665, 682-3 (1972), held that the First Amendment does not invalidate the enforcement against the press of laws of general applicability despite the possible burden that may be imposed. A publisher "has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." The press "is not free to publish everything it desires to publish." There it was claimed that requiring identification of sources promised confidentiality

would impose an unconstitutional burden on news gathering. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 581-3 (1983), also stressed that states can subject newspapers to generally applicable regulations without creating constitutional problems.

A 1990 decision also rejected a claim that the First Amendment frees certain groups from laws restricting the conduct of everyone else. *Employment Div., Dept. of Human Resources v. Smith*, 110 S.Ct. 1595, 1604 (1990), held that generally applicable state laws that have the effect of burdening a particular religious practice are enforceable without the need of showing a compelling governmental interest. Allowing exceptions to rules governing the rest of society would produce "a private right to ignore generally applicable laws." Far from being required by the First Amendment, the Court declared that such a practice would be "a constitutional anomaly." The Court applied this decision in *Minnesota v. Hershberger*, 110 S.Ct. 1918 (1990).

Unlike the Minnesota Court of Appeals (A-30-31), the state Supreme Court viewed the enforcement of contracts or promises by the press as impermissible under *New York Times, supra*. A-12 n.6. *New York Times* itself made no mention of either cause of action which, contrary to unintentional defamation, involves knowing and deliberate conduct by the press. This Court has not condoned intentional or reckless misconduct even for defamation of public officials.

Instead, it has condemned the use of lies by the press as not deserving of constitutional protection. *Harte-Hanks v. Connaughton*, 109 S.Ct. 2678, 2696 n.34 (1989), held:

> Of course, the use of "calculated falsehoods" does not promote self-determination. . . . For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.

As the Minnesota Court of Appeals noted (A-36-37), the reporters who negotiated the agreement of confidentiality with Mr. Cohen anticipated that he would give them in return damaging information about a Democratic candidate. Notwithstanding the opinion below, newspapers should not have a First Amendment license to break promises given in return for information relating to political campaigns. This Court emphasized in *Harte-Hanks*, 109 S.Ct. at 2696, that it has not accorded the press absolute immunity in its coverage of elections. A promise made to obtain information on office seekers should be judged by the same rules as any other promise.

Constitutional rights are subject to waiver through agreements. *D. H. Overmyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185-6 (1972). The opinion below failed to address at all the Minnesota Court of Appeals' analysis and holding (A-35-37) that the newspapers through their reporters' promises to petitioner waived the assertion of any First Amendment rights.

Further, allowing newspapers to break promises exchanged for facts about political candidates will, as Justice Yetka pointed out, discourage other sources from providing

material and thus reduce the amount of information made available to the public about their qualifications. A-15[3]

The publication of truthful information does not automatically confer immunity from liability. *The Florida Star v. B.J.F.*, 109 S.Ct. 2603, 2608-9, 2610 n.8, 2613 (1989), protected the publication only of lawfully obtained truthful information and refused the invitation to hold that unlawfully acquired information may not be published. The Minnesota Court of Appeals indicated that information procured through violated promises of confidentiality is not lawfully obtained. A-35.

In another context, *James v. Illinois*, 110 S.Ct. 648, 651 (1990), held that certain truthful, but illegally obtained, evidence must be excluded from criminal trials to protect people from disregard of their rights during investigations. Various rules limit the means by which government may conduct the "search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history." Newspapers should not be granted greater rights than judges, juries, and law enforcement officials to obtain information at any cost by violating the rights of others.

B. The Contract Clause.

In declaring unenforceable an entire category of agreements, which includes but apparently is not limited to prom-

[3]On October 29, 1982, the Pioneer Press itself published an editorial, "Relevant Disclosures," which said that "too much is being made" about the source of the disclosures about Ms. Johnson. "To focus on how the information got to the public's attention is to overlook a larger issue. That is, the information about the lieutenant governor candidate, Marlene Johnson, is something the voting public deserves to know. . . . [I]t is legitimate to examine her past as part of an assessment of her fitness for public office. . . . The last-minute disclosure could have been avoided if Mr. Perpich and Ms. Johnson had informed the public themselves earlier and confronted the issue squarely." plaintiff's ex. 29.

ises of confidentiality in exchange for information on political candidates, the opinion below also conflicts in principle with decisions of this Court regarding the Constitution's Contract Clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977).. *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983), cited in the opinion below (A-10), held that promises rendered binding through estoppel are entitled to the normal enforcement remedies of general contract law and are subject to the Contract Clause.

Moreover, a conventional contract also is present in this case.[4] The trial court held that the newspapers entered into and deliberately breached a contract with Mr. Cohen "where the hornbook elements of offer, acceptance, and consideration were unmistakably present." A-68. The Minnesota Court of Appeals held that an "agreement to provide information, like any other service, is an appropriate subject matter for the law of contracts." A-33. The Minnesota Supreme Court itself acknowledged the existence of an offer, an acceptance, consideration, and a breach here together with the intention by the promisors to keep their promises. A-7. Justice Kelley said that "any other corporate or private citizen of this state under similar circumstances would most certainly have been liable in damages for breach of contract." A-17.

The use of confidential sources is an essential business practice of journalism. The trial court held that a promise for confidentiality in exchange for information between a reporter and a political campaign worker is a commercial

[4]Note, *Promises and the Press*, *supra* at 1557 n. 19, assumed that a promise of confidentiality in exchange for information forms a valid contract.

arrangement and it is unreasonable to compare it, as the Minnesota Supreme Court did, to a promise involving a romantic or family relationship. A-66. Journalist, dean, and professor Elie Abel wrote, "A leak is the outcome of a transaction between reporter and source, and, like other successful transactions, it necessarily serves the interests of both parties." E. ABEL, *supra* at 62. In particular, a promise of confidentiality is "typically the price that a journalist must pay to secure meaningful information about the operation of government." Langley & Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 Geo. Wash. L. Rev. 13, 26 (1988).

Some decisions antedating *Allied Structural Steel, supra,* held that the Contract Clause only applies to legislation and not to judicial opinions. This case demonstrates, however, that a court decision can have an effect akin to statutes by invalidating a class of contracts. The First Amendment, which by its terms governs only acts of Congress, bans any offending governmental conduct; similarly, the Contract Clause should prohibit any state governmental action which nullifies contracts.

III.

THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER JURISDICTIONS.

The opinion below conflicts with decisions of other state courts of last resort and federal courts.

Doe v. American Broadcasting Cos., 152 A.D.2d 482, 543 N.Y.S.2d 455 (1989), *appeal dismissed*, 74 N.Y.2d 945, 550 N.Y.S.2d 278, 549 N.E.2d 480 (1989), affirmed a denial of summary judgment for a claim of breach of contract alleging violation of promises that faces and voices would not be recognizable in television broadcasts.

Mayer v. State, 523 So.2d 1171, 1176 (Fla. App. 2 Dist. 1988), *review denied*, 529 So.2d 694 (Fla. 1988), upheld a contempt judgment, despite First Amendment claims, against a reporter who broke a promise not to publish information on a hearing at which a judge allowed her to be present. The decision distinguished several Supreme Court decisions on the grounds that the reporter violated conditions she expressly accepted in order to obtain the data in the first place.

A U.S. district court decision, *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282, 1292 n.15 (N.D. Ill. 1986), recognized a valid breach of contract claim where a media organization breaks an agreement not to publish information.

The failure of the opinion below to address the issue of waiver is in discord with *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*, 853 F.2d 1084, 1096-7 (3d Cir. 1988), which held that parties may waive putative First Amendment rights. *Erie* rebuked a party's attempt to withdraw from its obligations after having the benefit of full performance by the other party.

Although *Ruzicka*, 733 F. Supp. at 1297-8, 1300, granted a summary judgment on First Amendment grounds, it indicated that the Minnesota Court of Appeals properly found that the newspapers waived their claimed First Amendment rights by their agreement not to identify Mr. Cohen. It also concluded that a plaintiff seeking to enforce a reporter-source agreement would meet First Amendment requirements by the proof of specific, unambiguous terms and clear and convincing proof of breach of contract. The opinion be-

low stated that respondents' dishonored promises were "clear-cut," "without dispute," and "unambiguous." A-9, A-11.

Other recent state high court decisions not dealing specifically with broken promises have held that the First Amendment only protects the press when it gathers news in a lawful manner. *State v. Heltzel,* 552 N.E.2d 31 (Ind. 1990); *City of Oak Creek v. King,* 436 N.W.2d 285 (Wis. 1989).

In like manner, U.S. Courts of Appeals have held that the press is not immune under the First Amendment from liability for torts committed in gathering news. In upholding restrictions on a photographer's access to Mrs. Jacqueline Kennedy Onassis, *Galella v. Onassis,* 487 F.2d 986, 995-6 (2d Cir. 1973), declared, "There is no threat to a free press in requiring its agents to act within the law."

Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971), also rejected claims based upon *New York Times, supra,* that the First Amendment allows the press to commit torts or crimes in newsgathering. "Indeed, the Court strongly indicates that there is no First Amendment interest in protecting news media from calculated misdeeds." Nor should the press be immunized from liability for damages caused by the publication of facts wrongfully acquired. To do so "would encourage conduct by news media that grossly offends ordinary men."

CONCLUSION

The opinion below, affecting the widespread media practice of promising confidentiality in exchange for information, embraces a theory of the Constitution which contradicts decisions of this Court.

In upholding the jury's verdict for Mr. Cohen, Judge Knoll held that to deny an injured person recovery for demonstrated harm caused by the breach of an otherwise valid contract would deprive him of the protection of the law without any countervailing benefit to the legitimate interest of the public in being informed. A-69. Instead, it would have the opposite effect of impeding the free flow of information.

As Justice Yetka declared, no one, including the news media, should be above the law. A-16.

For the reasons stated herein, petitioner Dan Cohen respectfully requests that this Court grant a writ of certiorari in this case.

Respectfully submitted,

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